

Her employments with PW1/2 and PW5 were illegal, as neither had a quota to employ a foreign worker.

Her passport was issued for two years by the Government of the Philippines and was valid only until 19 February 1988. It contains an employment visa, permitting her to enter for the purposes of employment with the Royal Squadron, Brunei.

The latter entry is dated 8 July 1986 and must therefore have been inserted in her passport after the appellant had started to work for PW1/2.

The Charge

The appellant pleaded not guilty to one charge, of which she was convicted, in the following terms:

That you (at about 0910 hours on 28 October 1992 at Immigration Department in the State of Brunei Darussalam not being a person entitled to remain in the State under the Provision of the Immigration Act Cap 17 of the Regulation made thereunder) did remain in the State after the expiry of your pass on 8 July 1987, contrary to s. 15(1) of the Immigration Act and punishable under s. 58 of the same.

It is clear that, although the date 28 October 1992 is alleged to be the date of the offence, because this was one of the days on which the appellant attended before the Department, the charge relates to a period before she surrendered herself to the Philippine Embassy, in that she remained in Brunei Darussalam after her pass had expired on 8 July 1987. I shall treat this appeal accordingly, in the same manner as the Magistrate did, by amending the charge by omitting the words within the brackets above.

Offence of strict liability?

It was argued on behalf of the appellant that s. 15(1) of the Immigration Act ("Cap 17") did not constitute an absolute offence, and that the prosecution must therefore prove that the appellant had the necessary *mens rea*.

In *Sherras v. De Rutzen* [1895] 1 QB 918, Wright J. observed, at p. 921:

There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence: but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered.

a The difficulty remains of applying this principle to the language of the statute under review. Section 15 of Cap. 17 is as follows:

Effect of cancellation or expiry of permit or pass

b 15(1) It shall be unlawful for any person to remain in Brunei after the cancellation of any Entry Permit or Re-entry Permit or after the making of a declaration under s. 14(4) or the expiration or cancellation of any Pass relating to or issued to him unless he is otherwise entitled or authorized to remain in Brunei under the provisions of this Act or of any regulation made thereunder.

(2) Any person who without reasonable cause contravenes the provision of subsection (1) shall be guilty of an offence.

d The principles which apply, when it is necessary to decide whether an offence is one of strict liability or not, are set out in the following passage from the judgment of Lord Scarman in *Gammon (Hong Kong) Ltd v A.G. of Hong Kong* [1985] 80 Cr. App. R 194 at p 199:

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- (1) There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;
 - (2) the presumption is particularly strong where the offence is "truly criminal" in character;
 - (3) the presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute;
 - (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;
 - (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.
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It does not seem to have been argued before the Magistrate, as it was on appeal, that s. 15(1) does not create an offence of strict liability and that it is thus necessary for the prosecution to establish *mens rea* on the part of a defendant before the burden of proving reasonable cause shifts to the latter.

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However, since the question has been posed, I must first decide if the section creates an offence of strict liability, applying the principles set out in the *Gammon* case.

The offence created by s. 15(1) is not, in my view, “truly criminal” in character. Although a contravention of the section may be strongly against the public interest, the offence could be characterized as “administrative” rather than “truly criminal”.

Section 15 contains a statutory offence. Is it a necessary implication of the Immigration Act that the presumption that *mens rea* is required should be displaced? It can be so displaced, if the statute is concerned with an issue of social concern. I have no doubt that the control of immigration is such a matter, since it is of much importance to a sovereign state that there should be control over the reception of foreign persons within its boundaries.

Nor am I left in any doubt that strict liability would help to promote greater vigilance in the matters covered by s. 15. I therefore reject the argument that the offence charged (and any other offence against s. 15(1) of Cap 17) is one which requires the prosecution to establish *mens rea* on the part of the defendant.

The prosecution need only establish that a defendant remained in Brunei after the expiration of the pass issued to her. The burden will thereupon shift to her to show, on the balance of probabilities, that she had “reasonable cause” for so doing.

I consider that the Magistrate was correct in concluding that the main question which he had to decide is whether the appellant had reasonable cause for remaining in Brunei after the expiry of her employment pass.

Findings by Magistrate

The Magistrate delivered a full and careful judgment. Although I have differed from his conclusion, it may well be that he would himself have found differently, if some of the matters which emerged on the appeal had been before him.

He found the following facts to be established -

- (a) the appellant remained in Brunei after the expiry of her employment pass on 8 July 1987;
- (b) she worked for three employers between 1986 and 1992;

- a (c) her employment by her second and third employers was illegal;
- (d) the three witnesses who employed her (PW1, PW2 and PW5) were unreliable and “were not witnesses of truth”;
- (e) the appellant was generally “convincing and reliable” and her evidence was to be accepted whenever it conflicted with that of PW1, PW2 and PW5.
- b (f) the passport was not in the physical possession of the appellant throughout her stay but was kept by her employers PW1 and PW2 from June 1986 to June 1989 and thereafter by PW5;
- c (g) she only discovered her passport in June 1992, as she described in her evidence and kept it thereafter;
- (h) that she did not know the expiry date of her pass, nor that she was overstaying in Brunei after 8 July 1987.

d It was on the basis of these findings, which are all supported by the evidence given in the trial, that the Magistrate approached the question of “reasonable cause” (described by the Magistrate as “reasonable excuse” though both phrases seem to me to mean the same).

e *Reasonable cause*

The Magistrate asks himself whether it can amount to reasonable cause, under s. 15(2) of the Act for a foreign worker to remain in Brunei after the expiry of her employment pass if -

- f (a) the worker does not know the date of expiry of her employment pass; and
- (b) the worker’s passport is kept throughout by her employer.

The Magistrate concludes that these facts do not amount to reasonable cause.

g One of his reasons for so finding is that the appellant should have kept her passport herself. This is not in accordance with the usual practice in Brunei, as the Public Prosecutor accepted, which is for a worker’s passport to be kept by the employer, not by the worker.

h This is not surprising, as the employer has already spent a considerable sum in bringing the worker to Brunei, whether or not an agent has been employed, and the retention of a passport gives an employer some protection against losing a substantial investment. This happens not only in the case of domestic servants but also with regard to the many

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foreign construction workers who come to Brunei; the latter's passports are usually kept by the employer, as I was informed.

When the passport is retained by the employer, is it reasonable for the worker to assume that the employer will take such steps as are necessary to ensure that the worker's stay in Brunei remains legal at all times?

The Magistrate takes the view that no distinction should be drawn between the situation where the foreign worker has physical possession of her passport and where her employer retains it. He finds that the responsibility, for ensuring that her stay is proper, rests solely on the worker, not on the employer at all. This would, he says, "mean absolving an immigrant worker of any responsibility whatsoever for her stay in this country".

It may be that the Magistrate would have come to a different conclusion if he had not found, in the following paragraph of his judgment, that the worker herself had an ample opportunity of ascertaining the expiry date of her passport, on arrival at the airport. However, if she had carried out such an examination, this would not have shown her when her employment pass expired, as this was only imprinted on her passport on 8 July 1986, whereas she entered Brunei on 19 June 1986.

The Magistrate does not accept the worker's explanation that she did not raise the issue of her status with her employers because she thought everything was in order. I do not find her reticence surprising. She had been brought from the Philippines on behalf of an employer. It is surely reasonable for her to assume that everything necessary to her legal continuation in Brunei would be done by the employer.

The Magistrate concludes that it would be reasonable to expect an immigrant worker to acquaint herself with the immigration laws and regulations of Brunei, the country in which she was to work. This is no doubt correct in theory, but it is in practice an unreasonable requirement, which I suspect is seldom, if ever, observed. It is, of course, correct that ignorance of the law is not an excuse in itself, but this general principle does not deprive a defendant of the defence provided by s. 15(2). It merely reinforces the fact that s. 15(1) creates an offence of absolute liability.

a *Conclusion*

Although it has been argued that some guidance is required as to what may amount to "reasonable cause" under s. 15(2) of Cap 17, it is important to realize that the facts of each case will vary and that it must not be assumed that the factual background to the unhappy experiences of this girl will be repeated.

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With that caution, I would regard reasonable cause as established, if the worker proves, (as the appellant did in this instance) to the satisfaction of a Magistrate, on the balance of probabilities, that -

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- (a) his passport was retained by his employer; and
- (b) he relied on his employer to take such steps as are necessary to ensure that his stay is at all times legal; and
- (c) **either** he did not know of the date of expiry of his employment pass **or** he did know but was assured that the employer would arrange for the necessary extension.

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This is not intended to be exhaustive. There will be other circumstances in which reasonable cause can be established, for example if a passport, in possession of a worker, is lost shortly before the renewal of an employment pass is due or if an employer goes abroad shortly before such a renewal, since it is apparently the sensible practice of the Immigration Department to extend an employment pass only if the employer himself asks for this.

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Prosecution of employer

I am informed that, in the past, it has been the practice to take proceedings, where a worker stays beyond the time permitted by an employment pass, against the worker, and not against the employer. Indeed, it appears that no prosecution of PW2 or PW5 had taken place until after the charge against the worker had been tried in this instance.

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I hope that, in future, those responsible will, before launching any prosecution, try to discover where the real blame lies, as it seems to have done in this case with the employers, rather than on the worker.

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The Magistrate was urged by Counsel for the appellant to direct the Public Prosecutor to charge the employers of the appellant. This he did not do. In my opinion, he was right, since by

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s. 374 Criminal Procedure Code the Attorney-General has the “general direction and control of criminal prosecutions and proceedings under this Code or under any other written law”. *a*

The correct course for a Magistrate to adopt, therefore, if he is of the opinion that a criminal offence has been committed by a person not charged before him, or any other Court, is to refer the record to the Attorney-General, with a request that the latter should consider whether a criminal prosecution is justified. *b*

Sentence

It is not necessary for me to consider, in view of the conclusion which I have reached, the sentence of two months imprisonment imposed upon the appellant, one which the Magistrate sensibly stayed pending this appeal. *c*

I must, however, comment that it is a severe one, bearing in mind that PW2 has been fined BD1500 for (apparently) the employment of a person who has offended against s. 15 of Cap 17. PW5 has not yet been tried, though he has, I am informed, been similarly charged. *d*

In circumstances such as those disclosed in this case, the major blame must surely lie on the employer rather than upon the worker. *e*

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